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No. 88-525

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES,
Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF AMICI CURIAE JANE ROE, JOHN DOE, INC. AND THE CONSENTING ADULTS TELEPHONE RIGHTS ASSOCIATION IN SUPPORT OF APPELLEE

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INTEREST OF AMICI *

Amici Jane Roe, John Doe, Inc., and Consenting Adults Telephone Rights Association ("CATRA") are the plaintiffs in *Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988), in which the court granted a preliminary injunction against enforcement of the same "indecency" prohibition at issue in this appeal. *Amici* are all involved in the business of engaging in or facilitating live, private, two-way telephone conversations, often of a frankly sexual nature, with adults who request such conversations and

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* Appellant and Appellee have both consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

pay for them in advance by credit card.[1] Such conversations range in length from ten to thirty minutes. Typically, about half the conversation is sexually oriented.[2]

Amici filed suit in New York at virtually the same time appellee Sable filed the instant litigation in California. Although engaged in a different business from Sable—live conversations rather than pre-recorded messages—*amici* were similarly threatened with prosecution and civil proceedings under 47 U.S.C. (Supp. III) § 223(b), as amended. *Amici* obtained preliminary injunctive relief similar to that obtained by Sable.[3]

Although the Government acknowledges that the live service provided by *amici* is "unlike" the service provided by pre-recorded message companies, *see* Jurisdictional Statement at 4, n. 4 ("J.S."), and although the Government has chosen, apparently for tactical reasons, to appeal only the Sable injunction, the questions presented in the government's appeal (and in Sable's cross-appeal) encompass both live conversations pre-paid by credit card and the pre-recorded messages at issue in the *Sable* litigation. Thus, a ruling by this Court could directly affect the relief *amici* have obtained in their case.

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[1] Jane Roe is a pseudonym for an adult resident of New York. John Doe, Inc., is a pseudonym for a New York corporation. CATRA is an association, all of whose members are engaged in the business described in text. CATRA sued in the district court and appears here on its own behalf and on behalf of its members.

[2] One objective of this business is to develop a personal relationship with the caller so that he will call back and request the other party to the conversation by name. Consequently, the conversations typically include non-sexual subject matter, such as the caller's personal life, occupation, interests in sports or politics, etc.

[3] "We preliminarily enjoin enforcement of 47 U.S.C. § 223(b) as it pertains to 'indecent' speech and permanently enjoin enforcement of this statute if such enforcement proceeding is based on 'indecent' conversations occurring while the preliminary injunction is in effect. All relief requested relating to 'obscene' conversations is denied." *Roe v. Meese*, 689 F. Supp. at 348.

Amici will present two arguments the parties are not expected to make.

SUMMARY OF ARGUMENT

Appellant bases its argument that this Court should accord plenary consideration to its appeal on the claim that, like the mid-afternoon radio broadcasts at issue in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), so-called "dial-a-porn" messages are "readily accessible to minors." J.S. at 22. *See, e.g.*, J.S. at 5, 11, 18, 19, 21, 23 and 24. But Appellant ignores the fact that on three separate occasions the FCC has ruled that minors have "virtually no access" to live telephone services that require pre-payment by credit card, which are fully subject to the statutory prohibition of indecent speech here at issue. Indeed, there is no evidence in the administrative, congressional, or judicial record (including the records in the instant case and *Roe v. Meese, supra*) that *any* minor has ever gained access to a live, credit card service. For that and several other reasons, *Pacifica* is inapposite and § 223(b) is unconstitutional as applied to live, credit card services. Accordingly, even if a total ban of indecent *pre-recorded* messages would be constitutional, § 223(b)'s manifest and substantial overbreadth renders it void on its face. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The Court should therefore dismiss this appeal for want of a substantial federal question or should summarily affirm the "indecency" ruling rendered below. Point I.

Moreover, it may prove unnecessary, in the present appeal and cross-appeal, to decide the constitutional questions presented by the parties. Because Sable derives no revenue and no commercial advantage from interstate calls to its pre-recorded message service, the rule of lenity and the maxim that statutes should be construed to avoid constitutional difficulties may place Sable's conduct outside the ambit of the statutory prohibition on obscene or indecent interstate telephone calls made "for commer-

cial purposes." If the Court does grant plenary consideration to the appeal and cross-appeal, therefore, it should direct the parties to brief this statutory issue as well as the constitutional questions framed in their jurisdictional statements. Point II.

I. CONTRARY TO THE APPELLANT'S CLAIM, SECTION 223(b)'S PROHIBITION OF "INDECENT" SPEECH CRIMINALIZES A SUBSTANTIAL AMOUNT OF SPEECH THAT IS CONSTITUTIONALLY PROTECTED FOR ADULTS AND IS VIRTUALLY INACCESSIBLE TO MINORS. BECAUSE THAT PROHIBITION IS PLAINLY OVERBROAD, THIS COURT SHOULD DISMISS THIS APPEAL FOR FAILURE TO PRESENT A SUBSTANTIAL FEDERAL QUESTION OR SHOULD SUMMARILY AFFIRM THE LOWER COURT'S "INDECENCY" RULING.

Appellant argues that speech that is constitutionally protected for adults (albeit "indecent") can nevertheless be prohibited entirely in order to ensure that minors will not gain access to it. Crucial to Appellant's argument is its assertion that the speech proscribed by section 223(b) "is readily accessible to minors." J.S. at 22. In reality, however, minors have virtually no access to live, one-to-one telephone services that can be accessed only by a caller having a credit card, which constitute a substantial amount of the constitutionally protected speech criminalized by section 223(b). Accordingly, even assuming, *arguendo*, that Congress could constitutionally prohibit indecent speech that is "readily accessible" to minors,[4]

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[4] *Amici* do not suggest that children's ease of access to a given kind of speech, without more, would justify criminalization of "indecent" speech of that type. *Butler v. Michigan*, 352 U.S. 380 (1957), among other decisions, holds to the contrary. Ease of access, however, is certainly a necessary, though not sufficient, condition precedent to such criminalization. Therefore, *amici* strongly believe section 223(b) is unconstitutional even with respect to *pre-recorded* messages, although it will not be necessary for the Court

section 223(b)'s ban on all "indecent" speech is overbroad and thus unconstitutional on its face. Just as the government cannot categorically proscribe and criminally punish constitutionally protected—but "indecent" —movies, books and magazines because of the risk that minors might occasionally gain access to them, it cannot ban all "indecent" interstate telephone calls made for a commercial purpose, at least when a substantial number of these are live calls pre-paid by credit card.

A. The Government May Not Prohibit And Criminalize "Indecent" Live, Private, Two-Way Telephone Conversations Between Consenting Adults Paid For In Advance By Credit Card.

When Congress originally passed section 223(b) in 1983, it directed the FCC to issue regulations providing defenses to prosecution when a telephone message service had taken steps that effectively prevented minors from having access to that service. In promulgating those regulations, the FCC consistently has recognized the important differences between live telephone services paid for by credit card holders, and pre-recorded message services (which cannot practicably impose a credit card requirement).[5] Appellant's effort to condemn *all* "dial-a-porn" on the ground that it is "readily accessible" to minors

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to resolve that question if *amici's* arguments are accepted. Moreover, it should also be noted that the FCC has recently found that new technology may make it possible effectively to limit access by children even to *pre-recorded* messages. *See* n.11, *infra*.

[5] In 1983, the FCC determined that live services could comply with section 223(b) by requiring payment by credit card before permitting access to their services. Even before that decision, most live services imposed such a requirement. In the case of pre-recorded message services, however, the FCC has determined that such a requirement "would be impractical, as those services allow multiple calls to access a message simultaneously." *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24996, 24998 (1984) (hereafter *"First Report and Order"*).

ignores these critical differences, and fails to heed Appellant's own warning that "careful analysis of context is necessary before the reasoning of *Pacifica* is extended outside the broadcasting context." J.S. at 18.

Contrary to Appellant's suggestion, gaining access to live services is certainly not "as easy as turning on a radio or television set . . . even for young children." J.S. at 18. In fact, the regulatory and congressional record makes clear that minors have *virtually no access* to live, two-way services accessed only by use of a credit card.

The FCC reached this conclusion on three separate occasions after careful investigation and "based upon [its] four-year experience receiving comments on and drafting and defending regulations." J.S. at 24. In its *First Report and Order*, the FCC concluded that:

> imposition of a credit card restriction upon [live] "dial-a-porn" providers *will effectively ensure that minors are denied access to such services.* The age requirement for obtaining a credit card combined with the fact that minors who are issued credit cards are usually subject to parental supervision as to use of the card, should effectively prevent access by underage callers.

First Report and Order at 25001 (emphasis added).[6]

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[6] The FCC's decision on this point was upheld by the United States Court of Appeals for the Second Circuit in *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 118-19 (2d Cir. 1984). In addition to requiring payment by credit card, live services take other steps to prevent access by minors. For example, it is common practice for live services to ask a caller if he has a telephone listed in his own name, and then verify that fact through directory service before authorizing service for the caller. If the caller does not have a listing in his own name, no service will be provided. Independent of such screening techniques, the cost of access to live services—which is approximately $35-$50, as opposed to a few dollars for services that provide pre-recorded messages—is likely to dissuade minors from using live services, particularly since this cost will later appear on a credit card bill sent to the home.

In October 1985, after receiving numerous comments from interested persons and after "careful consideration of the record," the FCC again determined that requiring payment by credit card effectively restricts minors' access to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699, 42701, 42706 (1985) ("*Second Report and Order*"). The FCC explained:

> In our [First] Report and Order we concluded that requiring prepayment by credit card effectively restricts minors' access to live "dial-a-porn" transmissions. . . . [N]ot finding any reason to reach a contrary conclusion in the augmented record, we find that this credit card provision is a suitable adjunct to the regulation we adopt today regarding recorded messages.

Id. at 42706. In its *Third Report and Order*, the FCC reached the same conclusion for the third time, finding that requiring pre-payment by credit card would ensure that minors would have "virtually no access" to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd. 2714, 2724 n.14 (1987).[7]

Throughout the FCC's three investigations there was *no evidence*, or even claim, that *any* minors have gained access to live, credit card services. In its *Second Report and Order* the FCC stated that "*no party submitting*

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[7] Indeed, the FCC considered itself bound by its statutory mandate to approve measures designed to screen out minors *only* if those measures would be "highly effective" and would ensure that minors would have "virtually no access" to adult telephone services: "As we interpret this statute, a *high degree of effectiveness* is contemplated so that if access is restricted to adults, as stated by the statute, minors will have *virtually no access to adult message services.*" *Third Report and Order*, 2 F.C.C. Rcd. at 2724 n.14 (emphasis added).

comments in this proceeding claims that the credit card restriction is ineffective to meet the mandate of Congress." *Second Report and Order*, 50 Fed. Reg. at 42706, n.56 (emphasis added).[8]

Similarly, throughout the congressional hearings and debates on section 223(b) as enacted and on proposed amendments, there was not a single claim of even one minor gaining access to live, credit card services. To the contrary, the legislative activity surrounding section 223(b) overwhelmingly focused on concerns about minors' access to *pre-recorded* message services, and *every* cited example of minors' access involved a *pre-recorded* message.

Perhaps most telling of all, in this litigation and in the New York litigation filed by *amici* (which focuses specifically on live services), the Government has failed to offer even a single complaint that a minor gained access to a live, credit card service. Accordingly, in the context of live services, there is no basis whatsoever for Appellant's contention that indecent speech is "readily accessible" by minors.

Appellant must therefore claim that access by minors, though "virtually" impossible, is not "totally" or "absolutely" impossible. J.S. at 24.[9] But the fact that it is

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[8] Nothing in the *Third Report and Order*, which reaffirmed the credit card requirement, suggests that any such evidence or claim was submitted during that investigation.

[9] Appellant's argument appears to be that even if a credit card requirement would be an "effective" way to prevent access by minors, as the FCC has repeatedly found, that requirement would not "totally" or "absolutely" preclude access by minors. In Appellant's view, total effectiveness is a "valid" legislative goal that justifies abridgment of adults' rights to have access to non-obscene speech: "And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, *effective as they might have been*, could not achieve the valid end of *totally* precluding access by minors." J.S. at 23 (emphasis added). *See id.* at 24 (stressing FCC statement that no requirement can

not "totally" impossible for minors to gain access to constitutionally protected "indecent" speech cannot justify a wholesale prohibition of that speech. If government could constitutionally prohibit "indecent" speech unless it were absolutely certain that no minor could ever gain access to that speech, it could prohibit *all* "indecent" speech—or other speech deemed potentially harmful to minors—in *all* media. To preserve adult access to speech that is protected for adults, the First Amendment requires that we accept some risk that minors may occasionally gain access to it. We permit adults to watch "R" rated movies while recognizing that minors may occasionally sneak in to see those movies; we permit adults to rent videotapes for home viewing that are "indecent" or even obscene as to minors while recognizing that some adults may permit minors to view those movies, or that minors may gain access without permission clandestinely or through a ruse; and we permit adults to purchase books and magazines with sexually explicit or otherwise "indecent" content even though some minors will inevitably gain access to these materials.

Indeed, this Court has consistently rejected the proposition that government can prohibit speech protected as to adults in order to insure that no minor will ever gain access to it. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court squarely rejected the State's assertion that it could "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." 352 U.S. at 383. The Court explained that this legislative approach was "not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.* Similarly, in *Bolger v. Youngs Drug*

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guarantee "absolute impossibility of access," but ignoring preceding sentence making clear FCC believed credit card requirement guaranteed "virtually no access").

Products Corp., 463 U.S. 60 (1983), this Court struck down a statute that prohibited unsolicited mailing of contraceptive advertisements despite the Government's claim that some minors could gain access to these materials. The Court explained that "a restriction of this scope is more extensive than the Constitution permits. . . . The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 73-74 (citation omitted).

Recently in *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987), this Court reviewed the Tenth Circuit's holding that a statute banning "indecent" cable television programming violated the First Amendment. Before the lower courts and on appeal to this Court, the State argued that outright prohibition of "indecent material" on cable television was necessary to protect children. Both the District Court and Court of Appeals rejected the State's contention and found that the statute unconstitutionally impaired the First Amendment rights of adults. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985); *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). This Court summarily affirmed the lower courts' decision striking down the statute. *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987).[10]

Just last term, this Court confirmed that statutes affecting speech must be narrowly tailored, and explained that a statute is narrowly tailored *only* "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Shultz*, 108 S. Ct. 2495, 2502 (1988) (citing *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810

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[10] *Accord Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (affirming lower court's decision to enjoin enforcement of ordinance prohibiting cable distribution of any "obscene or indecent material"); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (holding statutory prohibition of "indecent" cable programming unconstitutional).

(1984)). Furthermore, the *Frisby* Court confirmed that a "complete ban" on speech can be justified "only if *each activity* within the proscription's scope is an appropriately targeted evil." *Id.* (emphasis added).

Section 223 cannot survive scrutiny under *Frisby*, *Wilkinson*, *Bolger* and *Butler*. Here, Appellant does not even argue that *adult* access to "indecent" speech is an evil that Congress could separately target and proscribe. Instead, the statute bars all adult access solely for the purpose of remedying minors' alleged access to some indecent speech. Even if a complete ban on pre-recorded messages were necessary to prevent minors' access to them—a contention *amici* dispute—it is uncontrovertible that the statute's outright ban on live, credit card services is *not* necessary, because minors have virtually no access to them. Accordingly, section 223(b)'s complete ban on "indecent" speech violates the First Amendment because it is not narrowly tailored to proscribe the only evil—access by minors—Appellant contends Congress could constitutionally proscribe.

Faced with the weight of these authorities, Appellant tries to argue that the criminal prohibition at issue here is similar to the broadcasting regulation upheld in *Pacifica*. In *Pacifica*, this Court explicitly "emphasize[d] the narrowness of our holding," 438 U.S. at 750, a point the Court later reemphasized in *Bolger*. 463 U.S. at 74. Virtually ignoring the differences between *Pacifica* and the issues presently before the Court, Appellant now asks for a dramatic expansion of that narrow holding. But the distinctions between the time-channeling regulation reviewed in *Pacifica* and a criminal prohibition of "indecent" speech by live telephone services are clear and substantial:

(1) The broadcast speech at issue in *Pacifica* was "uniquely accessible to children," 438 U.S. at 749, who simply had to overhear or turn on a radio. *Pacifica*

stressed the "ease with which children may obtain access to broadcast material." *Id.* In contrast, minors have virtually no access to live, credit card services.[11] Moreover, the substantial control parents exercise over access by their children to credit cards, *see First Report and Order* at 25001; *cf. Bolger*, 463 U.S. at 73 (parental control over incoming mail), contrasts sharply with the difficulty of parental control over children's access to radio in the early afternoon, *Pacifica*, 438 U.S. at 732 (quoting the FCC).

(2) Although Appellant argues that the "similarity" of telephone services to broadcasting is "underscored" because messages can be provided to thousands of callers "simultaneously," J.S. at 20, that claim is not true in the case of live telephone services paid for by credit card. To the contrary, persons using these services participate in individualized, private conversations.[12]

(3) Section 223(b) imposes criminal penalties, including substantial fines and imprisonment. The regulation upheld in *Pacifica* involved only administrative action, and the Court expressly noted that it was *not* deciding

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[11] The FCC also believed that new technology could serve a similar function for pre-recorded services. *See Third Report and Order* at 2721-22. If this Court were otherwise to agree with Appellant that ease of access to pre-recorded services would render the statute constitutional as applied to such services (a ruling that would depart substantially from this Court's prior decisions), and for some reason were to reject *amici's* overbreadth argument, then this Court in deference to the FCC should affirm the preliminary injunction in the instant case and remand for fact-finding on the efficacy of the new technology approved by the FCC in its *Third Report and Order*.

[12] Even with pre-recorded services, the better analogy is to *cable* television, not broadcasting, because the messages are confined to cable transmission, not sent through the air. And even as compared to cable television, of course, it is far less likely a child will overhear a telephone message or conversation than a television message.

whether the same speech could be subjected to criminal sanctions. 438 U.S. at 750.

(4) Section 223(b) imposes an outright ban on speech covered by the statute. The regulation in *Pacifica* was a mere time-channeling provision. Indeed, the FCC had emphasized that its regulation was "never intended to place an absolute prohibition on the broadcast" of the speech there at issue. 438 U.S. at 532-33. *See also* 438 U.S. at 750; 438 U.S. at 760 (Powell, J., concurring).

(5) Appellant's argument that this case is similar to *Pacifica* because "significantly, adults remain free to purchase recordings containing the identical messages at book or record stores," J.S. at 24, is completely invalid in the context of live services. These interactive, personalized conversations, often with a specific individual requested by the caller, cannot be purchased at a record or book store.[13]

(6) Contrary to Appellant's contention, it cannot reasonably be argued that this case is like *Pacifica* because the speech at issue invades the " 'privacy of the home' " and interferes with " 'the individual's right to be left alone.' " J.S. at 19 (quoting *Pacifica*, 438 U.S. at 748). In *Pacifica*, the Court expressed concern that because "the broadcast audience is constantly tuning in and out" individuals might be confronted with "unexpected program content." 438 U.S. at 748. Live or pre-recorded telephone services, however, do not impinge upon the individual's "right to be left alone" in that or any other sense—calls are initiated by the caller, not the telephone service, and the messages are discrete, not part of a stream of other programming.

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[13] Moreover, the availability of similar speech in a different medium was not and should not be the touchstone of *Pacifica*. The Court's point there was that the *same* speech was available to adults through the *same* medium at a different time of day. Availability of motion pictures at video stores hardly renders motion picture theaters or cable television subject to "indecency" regulation.

(7) The *Pacifica* regulation was supported by FCC fact-finding, while section 223(b) is not: The FCC had expressly determined that the regulatory action at issue in *Pacifica* was a necessary and reasonable means to channel indecent speech " 'to times of day when children most likely would not be exposed to it.' " 438 U.S. at 733 (quoting the FCC). In contrast, the FCC has determined three times that minors can effectively be denied access to live telephone services by methods (*i.e.*, the credit card requirement) far less draconian than section 223(b)'s blanket prohibition.

In short, the factors relied on in *Pacifica* provide no support for upholding a statute that criminalizes constitutionally protected telephone conversations between consenting adults when minors have "virtually no access" to the prohibited speech.

B. Because Section 223(b) Purports To Criminalize "Indecent" Live, Private, Two-Way Conversations Paid For By Credit Card, It Is Substantially Overbroad And Therefore Unconstitutional On Its Face.

For the foregoing reasons, even if the First Amendment did permit criminalization of pre-recorded messages that are not obscene (a proposition which is also strongly at odds with this Court's decisions discussed above), the statute is facially unconstitutional. It is well established that statutes that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application," and that "[c]riminal statutes must be scrutinized with particular care." *City of Houston v. Hill*, 107 S. Ct. 2502, 2508 (1987). *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). *Cf. Frisby v. Schultz*, 108 S. Ct. at 2504 (White, J., concurring).

It is indisputable that live services engage in a very substantial amount of the speech criminalized by section 223(b)'s "indecency" prohibition. As explained above,

throughout the FCC's "four year experience receiving comments on and drafting and defending regulations," J.S. at 24, the FCC has consistently recognized the substantial volume of calls handled by live services, and established the credit card defense for live services recognizing it was unavailable to pre-recorded services. *See* n.5, *supra; see, e.g., First Report & Order* at 24998. As amended, section 223(b) ignores these differences and explicitly criminalizes "direct[]" as well as recorded communications. 47 U.S.C. § 223(b)(1).

Because no substantial argument can be made that criminal prohibition of indecent speech occurring in live telephone conversations pre-paid by credit card is constitutional, the Government's appeal should be dismissed for want of a substantial federal question. Alternatively, the lower court's ruling on the "indecency" provision—like the similar ruling at issue in *Wilkinson v. Jones*, 107 S.Ct. 1559 (1987)—should be summarily affirmed.

II. IF THE COURT NOTES PROBABLE JURISDICTION, IT SHOULD ALSO EXAMINE WHETHER SECTION 223(b) IN FACT REACHES SABLE'S CONDUCT.

If the Court notes probable jurisdiction of either the Government's appeal or Sable's cross-appeal, it should also examine whether § 223(b) actually reaches Sable's conduct. Section 223(b) imposes criminal and civil penalties only for indecent or obscene calls that are both "interstate" and made for a "commercial purpose." 47 U.S.C. § 223(b). There is a substantial question whether calls initiated from outside California to Sable's pre-recorded message service in California were made for a "commercial purpose." Sable cannot collect any revenue from interstate calls and gains no other business advantage from such calls.[14]

[14] For local "976" calls, Sable receives a portion of the service charge collected by Pacific Bell, the local telephone company. Sable Br. at 5. Pacific Bell, however, does not have billing arrangements with long distance companies that would allow long distance "976"

The FCC has taken the position that an interstate call is made "for commercial purposes" whenever the "messages are transmitted in connection with a business enterprise," whether or not the provider gains any business advantage from the call. *In the Matter of Intercambio, Inc.*, 64 Radio Reg. 2d 1663, 1671 (April 21, 1988) (Sable Br. at J-19). With this expansive reading of the statute, however, the FCC seeks to do what Congress has explicitly chosen not to do, *i.e.* to ban intrastate as well as interstate telephone services.

The Communications Act expressly leaves the regulation of intrastate communications to the States.[15] Because it is presently impossible for Sable to prevent out-of-state callers from calling its intrastate service,[16] the effect of the FCC's expansive reading is to impose § 223(b)'s criminal prohibitions on every telephone service, regardless of whether it is used by an intrastate or interstate caller. Indeed, even if no out-of-state caller actually used the service, the Government could manufacture a violation by placing the interstate call itself—from which Sable would receive no commercial benefit. The result of such a construction would be unavailability

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calls to be billed to the caller. *See* Sable Br. at J-27. The service charge therefore is neither levied nor collected. Moreover, there is no evidence in the record to indicate that Sable reaps a promotional advantage for its intrastate service from the interstate calls.

[15] *See, e.g.*, 47 U.S.C. § 152(b)(1) ("nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier").

[16] At present, Pacific Bell's "976" numbers can be reached from anywhere in North America simply by dialing the area code plus the "976" number. Pacific Bell is apparently now developing an information access service that would be exclusively intrastate, but this service is not yet available. *See Intercambio*, Sable Br. at J-25 n.41. Thus, it is presently technologically *impossible* for Sable to offer its service without being subject to interstate calls.

of the message to intrastate callers. The FCC's construction of the phrase "for commercial purposes" therefore violates congressional intent, evident from the face of the statute, to criminalize only interstate obscene and "indecent" calls.

The FCC's interpretation of "commercial purposes" also violates two well-recognized canons of statutory construction—that criminal statutes be construed narrowly and that statutes be construed, where possible, to avoid implicating First Amendment freedoms.[17] Here, not only did the FCC adopt the broadest possible construction of "commercial purposes," but it did so without considering either the First Amendment or penal implications of its ruling. *See In the Matter of Intercambio, Inc.*, Sable Br. at J-19-20; *In the Matter of Audio Enterprises, Inc.*, 64 Radio Reg. 2d 1681, 1690 (FCC, April 21, 1988).[18]

A more limited construction of "for commercial purposes" is consistent with congressional intent. The prin-

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[17] See, e.g., *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"), quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Frisby v. Schultz*, 108 S.Ct. at 2501 ("statutes will be interpreted to avoid constitutional difficulties"); *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) ("a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind"); *United States v. Batchelder*, 442 U.S. 114, 122 (1979) ("statutes should be construed to avoid constitutional issues").

[18] Because the FCC failed to consider whether § 223(b) should be read more narrowly in light of its criminal sanctions and its effect on the exercise of First Amendment freedoms, the FCC's construction of § 223(b) should not be accorded any deference. An agency's interpretation of an ambiguous statutory term is to be accorded deference only if the agency has made a "reasoned and detailed" consideration of the issue, *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), including a consideration of "all relevant factors." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 152 (D.C. Cir. 1984). *See also Motor*

cipal sponsor of § 223(b), Congressman Bliley, said "for commercial purposes" included "activities which may be financially profitable in themselves" as well as "other types of commercial activity" including "advertising or promotional activities for ventures such as magazines or movies." 129 Cong. Rec. H10559 (Nov. 18, 1983).[19] This language does not preclude the conclusion, otherwise supported by the structure of the Communications Act, the literal language of § 223(b) itself, and by canons for construing penal statutes and statutes impinging on First Amendment freedoms, that Congress intended to prohibit only interstate calls made for the purpose of gaining a business advantage.

This Court should decide constitutional questions only when the dispute cannot be resolved on statutory grounds. *Crowell v. Benson*, 285 U.S. 22 (1932). Because there is a substantial question whether § 223(b) reaches Sable's conduct, in the event this Court notes probable jurisdiction, it should ask the parties also to address the statutory interpretation issue.

Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem").

[19] Senator Trible made a similar statement prior to enactment of § 223(b) by the Senate. *See* Remarks of Senator Trible, 129 Cong. Rec. S16867 (Nov. 18, 1983).

CONCLUSION

For the foregoing reasons, the Government's appeal should be dismissed for want of a substantial federal question. If the Court grants plenary consideration to that appeal and/or Sable's cross-appeal, it should supplement the questions presented as suggested in Point II of this brief.

Respectfully submitted,

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